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No. 91-269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, et al.,
Petitioners,

v.

WILLIAM McKINNEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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II.

ARGUMENT

Petitioners respectfully submit that the arguments in the Respondent's Brief in Opposition are flawed, and, albeit inadvertently, underscore the necessity for guidance from this Court on whether an inmate states an Eighth Amendment claim by alleging involuntary exposure to environmental tobacco smoke (ETS).

Petitioners will reply to the respondent's reasons for denying the writ in the numerical order presented in the Brief in Opposition, pages 5 through 12.

1. Respondent argues that since the Ninth Circuit Court of Appeals has already decided that exposure to ETS poses an unreasonable health risk for which an inmate may state an Eighth Amendment claim, it is now merely left to the district courts to wrestle with the details of deciding what is unreasonable

and what remedies are appropriate. This begs the question, which is whether the Ninth Circuit properly held that an inmate's exposure to ETS states an Eighth Amendment claim.

Secondly, it is not simply the decision of the Ninth Circuit which has created uncertainty for states and prison administrators nationwide. As amply demonstrated in the Petition, and in the Brief Amici Curiae, recent decisions in the Fifth, Seventh, Ninth and Tenth Circuits, and in at least six district courts, have resulted in conflicting results on this question. There is a strong need for uniformity and for resolution of this issue to prevent years of expensive and time-consuming litigation.

Respondent purports to know that the Ninth Circuit's ruling will have no adverse or costly effect on prison

systems, presumably on the grounds that some prison systems "have taken steps to separate non-smoking prisoners from cigarette smokers." Petitioners respectfully suggest the majority of states already do what they can, given the constraints under which they operate, to accommodate both smokers and non-smokers. Nonetheless, lawsuits continue to be filed by smokers and non-smokers, and state officials and prison administrators are justifiably concerned with the potential impact of having to either completely eliminate smoking or expand facilities to accommodate both factions.

Respondent asserts that because he is presently housed in a different prison within the State of Nevada than when the lawsuit was initiated, that more fact-finding is needed before the Court considers this issue. But regardless of

where he is now housed, he is within the Nevada Department of Prisons system, subject to being transferred to any of its prisons, and still subject to all its rules and regulations, including those concerning smoking and non-smoking areas.

2. Respondent attempts to convince this Court that all the circuit court and district court opinions cited by Petitioners and by Amici Curiae are actually in harmony with each other, and easily distinguished from this action. Petitioners disagree.

The two recently-decided Ninth Circuit opinions, McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991), and Johnson v. Moore, 926 F.2d 921 (9th Cir. 1991), are in conflict because the former holds that a mere allegation of exposure to "unreasonable" levels of ETS is sufficient to state an Eighth Amendment claim, even in the absence of medical

problems. In contrast, the Ninth Circuit panel deciding Johnson held there was no deliberate indifference to Johnson's serious medical needs, due to "...a lack of medical substantiation for his claimed allergy." That panel noted that, in any event, prison officials did accommodate Johnson's request to be in a single cell.

It is difficult to comprehend Respondent's insistence that there is no conflict between McKinney and the recently decided case of Steading v. Thompson, 1991 WL 158070 (7th Cir. (Ill.)), 60 U.S.L.W. 2148. In the wake of Wilson v. Seiter, 111 S.Ct. 2321 (1991), the Steading court clearly rejected the proposition relied on by the Ninth Circuit in McKinney that an Eighth Amendment violation may be stated even where the inmate cannot show the complained-of conditions were permitted to exist as punishment. In addition,

respondent's claim at the district court level was just as "focused" as the prisoner in Steading, because in both cases the inmate sought to establish a right to a smoke-free environment.

Respondent's perception that all the cases cited in the Petition are either distinguishable or in harmony is not well taken. Although there are certainly some factual distinctions among them, this does not automatically render them irrelevant to this case. For example, respondent states that Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983) which concerned a state employee's claim of a right to a smoke-free work environment, is not an Eighth Amendment case. But the rationale in Kensell is relevant, and the circuit court in Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990) reh'g. granted Nov. 14, 1990, discussed Kensell in explaining its own

decision.

Similarly, in Wilson v. Lynaugh, 878 F.2d 846, 851 (5th Cir. 1989), the Court decided the res judicata issue at least in part upon its observation that there had not been any intervening change in law regarding non-smokers rights to trigger an exception to the res judicata rule.

McKinney argues there is no conflict between Wilson and the instant case "because the district court will have to assess whatever evidence is submitted on remand in light of Wilson." This assumes there will be a retrial, which is not at all certain. The Ninth Circuit reversed and remanded McKinney's claim "...for further equitable proceedings, including a trial, if necessary..." (Pet.App. A-42). In any event, an eventual retrial would do nothing to resolve the conflicts among the circuits and district courts,

and would only serve to delay consideration of this issue.

3. The Ninth Circuit, in support of its decision that inmates' exposure to environmental tobacco smoke could violate the Eighth Amendment, reasoned that the evolving standard of decency in our society today may be determined by examining recent state and federal legislation. (Pet. App. A-25-A-29). The Court placed heavy emphasis on state statutes regulating smoking in public places. Petitioners respectfully refer this Court, however, to Judge Tacha's dissent in Clemmons v. Bohannon, supra, at p. 872:

> ...a review of the state legislation cited by the majority as forbidding or restricting smoking reveals that the vast majority of these laws are limited to public places, which are statutorily defined so as to exclude prisons. [footnote 1]. Thus, although society's attitude as indicated by the objective factor of state legislation shows a trend toward protecting the rights of nonsmokers in public places, society

> has expressly rejected extending these protections to prisons and nonsmoking prisoners...
>
> The fundamental error of the majority's approach lies in the presumption that it is the duty of the courts to spearhead society's evolving standard of decency. Rather, the Supreme Court has emphasized that it is our duty to apply society's standard even though the standard may be "restrictive and even harsh." [citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)]

[Note: To date, no decision has been issued following rehearing in Clemmons.]

In 1991, Nevada's state legislature chose to make it clear that Nevada's laws restricting smoking in certain public places do not apply to its prison facilities. This is a strong indicator that the Ninth Circuit's perception of the present standard of evolving decency may be erroneous.

Respondent argues the issue on appeal before the Ninth Circuit "reasonably embrace[d] the question whether McKinney had stated an Eighth

Amendment claim, including whether the magistrate was correct in viewing this issue in all-or-nothing terms." Petitioners disagree. At trial, pursuant to the pretrial order agreed to between defendants (Petitioners) and respondent, respondent argued that he had serious medical needs which were ignored by defendants, and, that he had a right to a smoke-free environment. The U.S. Magistrate, on a motion for directed verdict, found he had failed to show either a serious medical need or that any of his medical needs had been ignored, and, under existing law, respondent had no right to a smoke-free environment. (Pet.App. B). The question on appeal was not whether case law should be changed, but whether the U.S. Magistrate abused her discretion in granting petitioners' motion for a directed verdict. McKinney did not show, nor did the Ninth Circuit

rule, that there was any abuse of discretion.

4. Respondent argues that Wilson v. Seiter, 111 S.Ct. 3221 (1991) does not and should not affect this case.

Clearly, respondent wishes to escape a review of his claim under the guidelines of Wilson. He asserts that because Wilson assumed an Eighth Amendment claim was stated, Wilson's requirements could not be applied to a case, such as respondent's, where the issue is whether a claim has been stated in the first place. Petitioners respectfully suggest that application of Wilson is not precluded simply because a case involves another issue to be determined.

Petitioners disagree with respondent's characterization of the U.S. Magistrate's order as addressing petitioners' state of mind with respect

to the claim of inadequate medical care only. As to that specific issue, the U.S. Magistrate held:

> Such testimony completely fails to establish deliberate indifference to serious medical needs. Nor does such testimony provide that the acts of the Defendants were the proximate cause of any injuries the Plaintiff might have sustained. (Pet.App. B-8)

But the U.S. Magistrate also made the following finding:

> There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff. (Pet.App. B-10)

Thus, regardless of whether the claim was considered in the context of a claim of deliberate indifference to serious medical needs or a claim against an alleged unconstitutional condition, there was a specific determination that none of the defendants (petitioners herein) acted with the intent required to

prevail under Wilson.

Respondent makes several arguments based on his complaint there is insufficient evidence in the record because the U.S. Magistrate did not hear evidence on specific issues. But whether the U.S. Magistrate's rulings on evidence offered by respondent were proper is not an issue on appeal. Respondent already had his day in court, and presented evidence which supposedly supported his case. If, in respondent's opinion, the record contains "insufficient evidence," he has only himself to blame.

Finally, Petitioners submit that the issue of whether inmates' exposure to environmental tobacco smoke meets the objective component of Wilson is ripe for consideration by this Court. States are faced with civil rights lawsuits from both smokers and non-smokers. See, e.g., California Men's Colony v. Rowland, et

al., 939 F.2d 854 (9th Cir. 1991) (prisoners' "association" brought suit to require prison administrators to resume discontinued practice of providing free tobacco to indigent inmates). Prison officials are justifiably concerned about their ability to effectively and safely classify, house and manage full prison populations. State administrators are concerned about the fiscal impact which adverse rulings may have. (See Brief Amici Curiae).

In society today, people outside prison walls are exposed to environmental tobacco smoke (often involuntarily) in many places, with statutory exceptions primarily directed at enclosed public places. Citizens may very well be at much higher risk for all kinds of damage to their health than those who are incarcerated. Most people will risk a potential traffic accident because the

ability to get to work, to school, or to one's home with reasonable speed and efficiency is of more immediate importance. In a prison setting, it is far more immediately important to be able to separate dangerous inmates such as warring gang members and to avoid the risk of violence, rather than to ensure that all smokers and non-smokers are kept apart.

Exposure of non-incarcerated persons to environmental tobacco smoke is not, in our society, considered cruel and unusual, even though it may be offensive and a potential health hazard. Likewise, this Court should decide that exposure to environmental tobacco smoke, in the absence of an existing serious medical need, is not cruel and unusual punishment in a prison.

5. Petitioners respectfully disagree with Respondent as to the need

for a ruling on the Ninth Circuit's interpretation of Rule 706 of the Federal Rules of Evidence. It is a matter of common knowledge and concern that the workload of the federal courts with respect to inmate civil rights cases continues to multiply at an alarming rate. This situation likewise affects the financial resources and staffing requirements of state prisons, state attorney general offices, and courts. Expert witness costs and fees are often the most expensive part of a lawsuit. Now the Ninth Circuit, without caveat or restriction, has essentially allowed indigent litigants to petition the courts with motions seeking orders to force the states and other "deep pocket" governmental entities to pay the entire cost of inmate litigants' expert witnesses. Petitioners respectfully suggest this is a situation which neither

the federal court nor most states can afford.

III.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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